No. 20-1338

ORIGINAL

In the Supreme Court of the United States

LI LI,

Petitioner,

v.

J. C. PENNEY COMPANY, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents important questions of federal law and public concerns regarding approval of a *sub rosa* plan pursuant to Bankruptcy Code 11 U.S.C. § 363. Allowing the lower courts' opinion to stand would permit this type of *sub rosa* plan hijacking Chapter 11 and patently transferring assets inequitably to continue. With growing numbers of bankruptcy cases nationwide, the opinion of this Court shall have profound implications on imposing the statutory scheme of the Bankruptcy Code on future bankruptcy cases. The questions presented are:

(1) Whether the lower courts erred in authorizing the sale of J. C. Penney's crown jewel assets pursuant to 11 U.S.C. § 363 under an impermissible *sub rosa* plan;

(2) Whether the Transactions satisfied the good faith requirement of Section 363(m);

(3) Should Li, a member of Ad Hoc Equity Committee (AHEC) be permitted to substitute the AHEC on motion and prosecute the appeal when the AHEC was unable to retain counsels to continue the appeal collectively due to professional fees.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Petitioner is not a corporation, has no parent corporation and no publicly held corporation that owns 10% or more of its stock.

RELATED PROCEEDINGS

In Re J. C. Penney Company, Incorporated, No. 20-20182, U. S. Bankruptcy Court for the Southern District of Texas.

Judgment entered November 12, 2020 to deny Ad Hoc Equity Committee's emergency motion to vacate final order.

Judgment entered December 14, 2020 to deny Ad Hoc Equity Committee's employment and retention of counsels to pursue an appeal.

Ad Hoc Committee of Equity Interest Holders v. J. C. Penney Company, Incorporated, No. 2:20-cv-280, U. S. District Court for the Southern District of Texas.

Judgment entered January 13, 2021 to dismiss the appeal and terminate all pending motions.

Li Li v. J. C. Penney Company, Incorporated, No. 21-40046, U. S. Court of Appeals for the Fifth Circuit.

Judgment entered February 17, 2021 to dismiss the appeal for lack of jurisdiction.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Fifth Circuit's February 17, 2021 opinion dismissing the appeal for lack of jurisdiction appears at Appendix A, 1a.

The District Court's January 13, 2021 opinion dismissing the appeal and terminating all pending motions appears at Appendix B, 2a-9a.

The Bankruptcy Court's November 12, 2020 opinion denying Ad Hoc Equity Committee's emergency motion to vacate final order appears at Appendix C, 10a-11a.

The Bankruptcy Court's December 14, 2020 opinion denying Ad Hoc Equity Committee's employment and retention of counsels to pursue an appeal appears at Appendix D, 12a.

JURISDICTION

The Fifth Circuit entered judgment on February 17, 2021. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 363(m) states:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property **in good faith**, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

STATEMENT OF THE CASE

I. Legal Proceedings

On May 15, 2020, J. C. Penney (the Debtor) filed voluntary petitions for relief (the Bankruptcy Case) under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division (the Bankruptcy Court). ROA[1].238, 560. J. C. Penney's assets were split into PropCo, which is comprised of the Debtor's real estate of 160 stores and 6 distribution centers; and OpCo, which is comprised of the Debtor's entire retail business. ROA.3216.

On October 20, 2020, J. C. Penney filed *Emergency Motion for the Sale of the OpCo,* seeking authorization to consummate the sale transactions (the Transactions) contemplated in the Asset Purchase Agreement. ROA.3215. The Ad Hoc Equity Committee (AHEC) in the J.C. Penney Bankruptcy Case filed its *Objection* to the OpCo Sale Motion on November 1, 2020 in the Bankruptcy Court. ROA.6887-6924. The Bankruptcy Court held a hearing on the Sale Motion on November 9, 2020. At the conclusion of the Sale Hearing, the Bankruptcy Court overruled the AHEC's Objection to the Sale Motion and entered the Sale Order. ROA.8737-8738. App. 10a-11a.

The AHEC filed a timely Notice of Appeal on November 13, 2020 to the District Court. ROA.13. The AHEC filed an Emergency Motion for Stay Pending

[1] ROA – Record On Appeal at the Fifth Circuit

Appeal on November 15, 2020. ROA.15. The District Court held a hearing on the Emergency Motion on November 20, 2020. The Court denied the Emergency Motion on November 20, 2020. ROA.178.

J.C. Penney objected the AHEC to retain counsels (Walter & Patterson, PC) to continue the appeal of the OpCo Sale pursuant to professional fees agreement. The Bankruptcy Court's order states "the Court lacks authority to impose the expenses of an ad hoc committee on non-debtor parties. Individual shareholders may, of course, voluntarily agree to such an arrangement". ROA. 9367. App. 12a.

J. C. Penney filed a Motion to dismiss the appeal at the District Court on December 14, 2020. ROA.189. Li, the petitioner, a member of the AHEC, ROA.316, obtained permission from the chairperson of the AHEC and filed a Response to oppose the Motion at the District Court on December 22, 2020, ROA.9034, as amended on December 31, 2020. ROA.9238. Li filed an emergency motion and requested to be listed as an interested person on December 28, 2020. ROA.9488. Walker & Patterson filed an emergency motion to withdraw as attorneys of the AHEC on December 31, 2020, ROA.9477.

The District Court entered Order and Final Judgment on January 13, 2021. The Order dismissed the appeal and terminated all pending motions. ROA.10425-10432, App. 2a-9a. Li filed Notice of Appeal on January 14, 2021. ROA.10433.

J. C. Penney filed Motion to dismiss at the Court of Appeals for the Fifth Circuit on January 25, 2021. Li filed a Response to oppose the motion on January

26, 2021. The Court of Appeals entered the order to dismiss the appeal for lack of jurisdiction on February 17, 2021. App. 1a.

II. Factual Background

J. C. Penney's crown jewel retail asset (OpCo), was sold to Simon Property Group and Brookfield Asset Management, the major landlords of J. C. Penney for about $800 million with $300 million payment from the Purchasers and about $500 million with Credit Bid[2]. ROA. 3216. The sale was privately negotiated with an inadequate price that is unsupported by any evidence of market value. ROA.6906. J. C. Penney urged the Bankruptcy Court to approve the Sale on an emergency basis. ROA.3215.

J. C. Penney argued they must consummate the OpCo Sale before the holiday season of 2020, the most profitable time of year for the retail industry, to avoid liquidation and job losses. As a matter of fact, retail stocks such as Macy's and Kohl's increased significantly during November and December 2020 and recovered all the losses during the COVID-19. According to a press release on December 7, 2020, J. C. Penney's DIP (Debtor in Possession) Credit Agreement was extended to April 1, 2021, as opposed to what J. C. Penney argued that the expiration of DIP Credit would be on November 24, 2020 and the expiration of DIP Credit would force liquidation. ROA.9369. J. C. Penney argued that the OpCo sale to Simon and Brookfield, would keep stores open and save 60,000 jobs. But shortly after the consummation of the OpCo sale, abandoned J. C. Penney stores were announced on December 17, 2020. ROA.9371-9374.

[2] "Mall Giants Strike $800M Deal for JCPenney", Published on CPExecutive, September 9, 2020.

Simon's stock traded at around $62/share on November 6, 2020 and the days before. After the approval of the OpCo sale to Simon and Brookfield, on November 9 and 10, in the first two trading days, Simon's stock traded at about $79/share. Based on total 328.1 million SPG (Simon Property Group) shares, it added approximately $5.6 billion market values to Simon Property Group. The share price continued to climb as high as approximately $95/share, added about $10.83 billion market values to Simon Property Group. ROA.9376. The Brookfield stock price increased as well.

In Sears, Mr. Edward Lampert won a bankruptcy auction after increasing his offer for the retail business from $4.4 billion to $5.3 billion[3]. In J. C. Penney, Mr. David Simon (Chief Executive Officer of Simon Property Group) described the OpCo transactions as "buying things cheap"[4]. The AHEC objected that the price offered from the Purchasers was privately negotiated, arbitrarily depressed, and unsupported by any evidence of market value. ROA.6906.

In a Declaration of Mr. William Snyder[5] to assess J. C. Penney's assets to support the AHEC's objection to the OpCo Sale, ROA.9380-9473, he demonstrated that the Debtor had approximately $1.4 billion of cash on hand, ROA.9384, $3.7 billion in real estate assets, ROA.9385, the sum of the values of cash, inventory and

[3] "US$5.3b deal said to allow Sears chief to keep stores open. If approved, chairman Edward S. Lampert will acquire most of bankrupt retailer's assets." Published on Banking Finance, January 18, 2019.

[4] "David Simon as Retailer with J. C. Penney" Published on Business Insider, November 10, 2020.

[5] Mr. Snyder has 35 years of extensive experience serving in advisory for companies undergoing turnarounds and restructurings in a variety of industries including retail. ROA.9381.

real estate, the "hard asset" totaled $6.5 billion. ROA.9386. The Debtor's intangible assets are expected to be approximately $1.6 billion to $3.6 billion. ROA.9387. The Debtor's projected 2024 e-commerce revenue of $2.3 billion with an EBITDA of $493 million. ROA.9386. Based on Discounted Cash Flow Valuation and Going Concern Orderly Liquidation Analysis, ROA.9425, 9440, 9444, presented in the Declaration, Mr. Snyder stated "Residual cash, asset values and preservation of the going concern result in maintaining a company with equity value, which provides for a recovery for unsecured creditors, and potentially shareholders." ROA.9384.

The AHEC's evidence does not support J. C. Penney's argument and the lower courts' holding that "Debtor's assets were insufficient to allow any recovery for equity interest holders under any available scenario". ROA.10427. Given the absurd disparity between the value of the assets and the offer from the Purchasers, the AHEC alleged the OpCo transactions were not in the best interests of the estates and the creditor constituencies. ROA.6888.

J. C. Penney and DIP lenders (the First Lien Majority Creditors in the J. C. Penney Bankruptcy Case) stated the sale of OpCo to Simon and Brookfield was not a "plug and play" sale to other bidders, chilling other potential purchasers and cherry picking Simon and Brookfield. ROA.6913. J. C. Penney hastily closed the OpCo sale and transferred the entire retail assets to the Purchasers before December 7, 2020[6]. The fiduciaries[7] in control are not disinterested in these

[6] J. C. Penney's Reorganization Plan was not confirmed as of January 31, 2021.

[7] Some shareholders alleged fraud, collusion, and other causes of actions in the Bankruptcy Court pursuant to a gatekeeper provision in the J. C. Penney's Bankruptcy Case. [Bankruptcy Court

transactions. ROA.6914. The AHEC objected the OpCo transactions not in good faith and not at arms-length. ROA.6922.

REASON FOR GRANTING THE PETITION

I. The Lower Courts Erred in Authorizing the Sale of J. C. Penney's Crown Jewel Assets (OpCo) Pursuant to 11 U.S.C. § 363 under an Impermissible *sub rosa* Plan Hijacking Chapter 11 Which Can Be Reoccurring in Future Bankruptcy Cases and Have Public Concerns. This Case is an Ideal Vehicle.

As this Court knows, § 363 sales are fraught with the potential for abuse. Courts and commentators have described preplan business sales under § 363 as hijacking chapter 11 because the strategic use of § 363 allows a debtor to not only "cherry pick" advantageous protections from chapter 11 but also to achieve a quick approval for the sale of all or substantially all of its assets without complying with chapter 11 requirements for plan confirmation. These concerns have fully manifested in J. C. Penney's OpCo Sale and related proceedings. The compressed timeline afforded to stakeholders to review the proposal, coupled with the absurd disparity between the value of the assets and the price paid by the Purchasers, would leave any reviewing court questioning the business judgment of a proponent alleging that they actually considered all available alternatives, and the sale transactions were in good faith.

The Transactions may be extraordinarily complex, the rationale behind J. C. Penney's decision to circumvent the fundamental requirements of the Bankruptcy Code to get it approved outside a plan of reorganization is readily apparent. J. C.

Docket 2174, 2185-88, 2191, 2193, 2285, 2288, 2354, 2371, 2375, 2410].

Penney and the DIP Lenders knew that this *sub rosa* plan was the only feasible way to complete the patently inequitable transfer of assets through the Bankruptcy Case.

A. The Sale is an Improper sub rosa Plan of Reorganization

J. C. Penney filed the Sale Motion at the same time the Reorganization Plan and Disclosure Statement were filed. J. C. Penney offered no justifiable reason why the Transactions should be approved by the Bankruptcy Court outside of a legitimate plan confirmation process. J. C. Penney's decision fell short of meeting the business judgment standard necessary to approve sales as described in *Institutional Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In Re Continental Airlines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986).

The preplan business sale is attractive to debtors because of its ease, speed, and finality. The lack of transparency, the pace of the process, and the inconsistent treatment by the courts, however, leave the bankruptcy courts and parties in interest vulnerable to unfair dealing, abuse, and sweetheart deals. *In re Gulf Coast Oil Corp.,* 404 B.R. 407, 420-21 (Bankr. S.D. Tex. 2009) (citing Rose, Elizabeth B., "Chocolate, Flowers and Section 363(b): The Opportunity For Sweetheart Deals Without Chapter 11 Protections", 23 Emory Bankr. Dev. J. 249 (2006)).

By simply proclaiming to the world that J. C. Penney had no other alternative and pressed forward with a sale under Bankruptcy Code § 363, the Debtor violated the law by short circuiting the requirements of 11 U.S.C. § 1101 et

seq. and establishing the terms of the plan *sub rosa* in connection with the sale of assets. *See Braniff*, 700 F.2d at 940.

B. The Sale Violates the Business Judgment Rule

"A principal goal of the reorganization provisions of the Bankruptcy Code is to benefit the creditors of the Chapter 11 debtor by preserving going-concern values and thereby enhancing the amounts recovered by all creditors." *In re Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363, 373 (5th Cir. 1987), aff'd, 484 U.S. 365 (1988). Accordingly, courts have declined to allow § 363 sales of substantially all of a debtor's assets where such sales would leave the debtor's estate with scant value that will only serve to frustrate a reorganization process. *See Braniff*, 700 F.2d at 940. A fundamental policy of bankruptcy law requires debtors in possession to have "an affirmative, overarching duty to reorganize and maximize estate assets for the benefit of all creditors" not just a select few. *In re R.H. Macy & Co.*, 170 B.R. 69, 74 (Bankr. S.D.N.Y. 1994).

i. J.C.Penney Merely Feigned Attempts to Effectuate a True Restructuring

The business judgment rule mandates that debtors legitimately explore available alternatives. J. C. Penney urged the Bankruptcy Court to approve the Transactions because they were on a noble mission to save the jobs of 60,000 employees. However, J. C. Penney paid little credence to the pleas of their own employees whose retirement pensions were explicitly linked to the value of equity being wiped out in the sale. As a matter of fact, in the Asset Purchase Agreement,

there appeared to be no commitment by the Purchasers to keep J. C. Penney locations open and preserve any jobs. ROA.3026.

Without adequately pursuing a true restructuring in the Bankruptcy Case, J. C. Penney could not meet the business judgment burden. Simply arguing that the only option is to consummate the Transactions in order to save jobs and avoid a liquidation is a false dilemma. In order to meet the high bar imposed by the business judgment standard, J. C. Penney must demonstrate that they have adequately explored alternatives. But the Debtor failed to do so.

ii. *J. C. Penney Did Not "Market Test"*

Bankruptcy courts generally do not approve asset sales without an opportunity for competitive bidding in order to maximize the sale price of the assets to be sold. *See, e.g., In re Food Bar Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997) (stating that in bankruptcy sales, a "primary objective of the Code [is] to enhance the value of the estate at hand"). Here, J. C. Penney did not propose any auction or market test. Rather, they sought approval of a privately-negotiated sale for an inadequate price that is unsupported by any evidence of market value. ROA.7050.

J. C. Penney painted a dire picture that it would run out of cash by August 2020, but it never came true. In reality, as of August 1, 2020, J. C. Penney's Net Cash Flow exceeded budget projection by 229.4%, and the Debtor accumulated $721 million more in short-term investment funds than they had projected to the Bankruptcy Court. As of September 5, 2020, J. C. Penney accumulated cash, cash

equivalents and restricted cash of $1.4 billion[8]. Given the extraordinary performance by J. C. Penney in accumulating cash and successfully operating in chapter 11, the OpCo Purchasers likely realized early on that they were in a prime position to siphon off significant value from J. C. Penney.

iii. J. C. Penney's Failure to Provide a Liquidation Analysis Demonstrates That the Transactions are Not in the Best Interests of the Estates

J. C. Penney did not provide a liquidation analysis one might expect in a confirmable chapter 11 plan. Instead, the Debtor used the value reflective of the "fire-sale" pricing in which the Debtor "must close the OpCo Sale before the holiday season", as a substitute for an independent liquidation analysis. This substitute for an independent liquidation valuation is a critical piece of information for the Court to determine whether the best interest of the creditors test under § 1129(a)(7) has been met.

Were a true liquidation analysis of J. C. Penney's assets to be provided, it would demonstrate the Transactions would amount to one of the greatest windfalls in a § 363 sale in recent memory. Indeed, the Debtor's cash on hand – which is being transferred in the Transactions – is more than the total purchase price of the OpCo which under ordinary circumstances would defy all logic.

J. C. Penney believed that liquidation of the Debtor's estate under chapter 7 of the Bankruptcy Code would not result in any holder receiving any greater recovery as compared to distributions contemplated under the Plan. Therein lies the

[8] "J.C. Penney Has $1.48 Billion In Cash And Over $300 Million In Credit Card Revenue, Are They Really Insolvent?" Published on Seeking Alpha by Eric Moore, August 31, 2020. Mr. Moore has over 20 years experience consulting in large complex bankruptcy cases.

problem. The applicable provisions of the Bankruptcy Code do not mandate that debtors merely "believe" anything about their Plan, because beliefs, hopes, and wishes do not meet evidentiary standards. J. C. Penney should actually prove to the Bankruptcy Court that the Plan is in the best interest of the creditors, and a crucial component of that burden of proof is a chapter 7 liquidation analysis.

C. The Evidentiary Standards Weight Heavily Against Approval of J .C. Penney's OpCo Sale

i. There is Insufficient Evidence of the Need for Speed

Early in the Bankruptcy Case, J. C. Penney insisted that they must exit bankruptcy before "back to school" shopping. This time period came and went and the Debtor continued to operate. The Debtor's financials did not reflect any negative impact the Bankruptcy Case had on sales. Indeed, there appears to be an inverse relationship between the Debtor's grossly pessimistic projections and the actual numbers. During "back to school" in Q2 and throughout Q3 of 2020, the Debtor showed a remarkable ability to continue to generate revenue while in bankruptcy.

J. C. Penney's narrative has since shifted. The Debtor professed their desire to close the OpCo Transactions immediately. The Debtor's intent to move at lightning speed to sell their valuable retail assets prior to the most profitable time of year for the retail industry defies logic, and there is no plausible evidence that failure to close before the holiday season would affect their financial performance. As a matter of fact, retail stocks such as Macy's and Kohl's increased significantly during November and December 2020 and recovered all the losses during the

COVID-19. The consummation of the Debtor's OpCo sale before the holiday season allowed the Purchasers to siphon off significant values from J.C. Penney.

In Gulf Coast, the Bankruptcy Court explained that disposition of perishable assets is the justification for moving quickly through a § 363 sale. *Gulf Coast*, 404 B.R. at 423. Here, the Transactions asserted by J. C. Penney are exactly opposite of the hypothetical situation contemplated in *Gulf Coast*. When reviewing the evidence, this Court should reach an identical conclusion to *Gulf Coast* and find that:

> "[t]here is no indication of a need for speed. There is no evidence that the assets are perishable or that any value will be lost through delay to permit plan confirmation. Although there is no indication that an expedited plan process would not achieve the same result, that is not the test. The movant must show that there is a need to sell prior to the plan confirmation hearing. It is not sufficient to suggest that the secured lender will be the only beneficiary under either scenario. The Fifth Circuit requires a showing of a business justification for the § 363(b) sale prior to plan confirmation, not merely a showing that it doesn't matter."

Gulf Coast, 404 B.R. at 427-28.

ii. The Debtor's Asset Purchase and Master Lease Agreements Preclude Participation by Other Interested Bidders

Next, the Court should consider whether the Debtor's Asset Purchase Agreement is sufficiently straightforward to facilitate competitive bids or is the purchaser the only potential interested party. Here, the Asset Purchase Agreement, the Master Lease Agreement, and all other relevant Transaction documents do not facilitate a competitive process. As Debtor's counsel presented to the Bankruptcy

Court, the Asset Purchase Agreement and Master Lease Agreement were inextricably linked such that the OpCo Transactions and PropCo Transactions could never be sold to a bidder willing to submit a topping bid for either piece. These are not "plug and play" Transactions. ROA.6913. Moreover, the Asset Purchase Agreement, through its strategic use of the Credit Bid, is designed to discourage any other potential bids. *See Gulf Coast*, 404 B.R. at 424.

iii. The Fiduciaries in Control of the Debtor are Not Disinterested in These Transactions

The management in control of J. C. Penney is not disinterested in the Transactions. The *Gulf Coast* factor explains that if the entities that control the debtor will benefit, or even potentially benefit, from the sale, then the Court must exercise caution when determining whether they have met the business judgment standard in accordance with applicable law. *Gulf Coast*, 404 B.R. at 424. Here, the available evidence indicates that the Debtor's management who already received significant bonuses and compensation packages immediately before J. C. Penney filed the Bankruptcy, are not completely disinterested in seeing these Transactions consummated[9]. Shortly after the consummation of the OpCo Sale, on December 31, 2020, with the Debtors' Reorganization Plan was not confirmed in the Bankruptcy Court, Jill Soltau, (Debtors' Chief Executive Officer), Bill Wafford, (Debtors' Chief Financial Officer), and Steve Whaley, (Debtors' Principal Accounting Officer and

[9] "J.C. Penney Executives Given Millions Of Dollars In Bonuses Days Before It Filed For Bankruptcy" Published on Forbes, May 18, 2020

Controller) resigned[10]. The three executives were directly involved in the J. C. Penney's Bankruptcy Case and the OpCo Sale. Some shareholders alleged the Debtor's executives for wrongdoings, and potential legal actions are in the pipeline[11].

II. The Transactions Failed to Meet the Good Faith Requirement of Section 363(m)

Bankruptcy Code § 363(m) articulates the "good faith" requirement of asset sales outside the ordinary course of business. See *In re Summit Global Logistics, Inc.*, 2008 Bankr. LEXIS 896, *26 (Bankr. D.NJ. 2008) (citing 11 U.S.C. § 363(m)).

The evidence submitted does not support a good faith finding in connection with J. C. Penney's OpCo Transactions. The AHEC raised the issue of good faith at the Bankruptcy Court to preserve the ground to appeal regarding the statutory mootness. ROA.6922, 9263. The Purchasers obtained the OpCo with an inadequate price far below the OpCo's true and fair market values. In the 94-page Declaration of Mr. William Snyder to assess the Debtors' assets based on Discounted Cash Flow Valuation and Going Concern Orderly Liquidation Analysis, ROA.9380-9473, he demonstrated that the Debtor had approximately $1.4 billion of cash on hand, ROA.9384, the sum of the values of cash, inventory and real estate, the "hard asset" totaled $6.5 billion. ROA.9386. The Debtor's intangible assets are expected to be approximately $1.6 billion to $3.6 billion. ROA.9387. Mr. Snyder stated "there is

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[10] Published on Securities and Exchange Commission, December 30, 2020. The details and terms and conditions of the three executives' resignation were not disclosed.

[11] [Bankruptcy Court Docket 2174, 2185-88, 2191, 2193, 2285, 2288, 2354, 2371, 2375, 2410], pursuant to the gatekeeper provision in the J.C. Penney Bankruptcy Case.

clearly value above the first lien debt available to provide a recovery to unsecured creditors, and potentially shareholders". ROA.9387. The numbers defy argument that the OpCo Sale for about $800 million was adequate and was in good faith. The OpCo Purchasers were not owed any funds from J. C. Penney and could not credit bid either.

In a separate assessment from Mr. Eric Moore, Mr. Moore stated "the J. C. Penney Bankruptcy is the strangest case, that J. C. Penney is not hopelessly insolvent and in fact has plenty of money left for unsecured creditors and shareholders if the right actions are taken and the right plan is implemented[12]". The evidence does not support J. C. Penney's argument that the OpCo Sale was in good faith and shareholders would have no recovery under any available scenario. ROA.10427. When combined with the overall lack of transparency over the course of several months, and on the emergency basis to approve the Sale, these Transactions simply do not pass the "smell test."

The Purchasers were J. C. Penney's major landlords with affiliation to the Debtor. In light of this, this Court should strictly enforce the standards imposed by the Bankruptcy Code and applicable law when considering whether the Debtor and the OpCo Purchasers truly bargained in good faith and at arms-length. In *In re River West Plaza-Chicago, LLC*, 664 F.3d 668 (7th Cir. 2011), the Seventh Circuit stated, "We now hold that § 363(m) does not make any dispute moot or prevent a

[12] "J.C. Penney Has $1.48 Billion In Cash And Over $300 Million In Credit Card Revenue, Are They Really Insolvent?" Published on Seeking Alpha by Eric Moore, August 31, 2020.

bankruptcy court from deciding what shall be done with the proceeds of a sale or lease." *Id.*

III. The Lower Courts Erred in Dismissing the Appeal as the Petitioner Has Appellate Right to Prosecute the Appeal

A. Li Is a Proper Appellant to Continue the Appeal of J. C. Penney's OpCo Sale Pursuant to Fed. R. Civ. P. 25

J. C. Penney objected the AHEC to employ Walker & Patterson to appeal the OpCo Sale pursuant to professional fee agreement. The Bankruptcy Court issued an order stating:

> "The Court previously entered orders requiring the Debtors to fund a total of $1 million of the Ad Hoc Equity Committee's professional fees and expenses. ... The Walker & Patterson application runs counter to that agreement... The Court lacks authority to impose the expenses of an ad hoc committee on non-debtor parties. Individual shareholders may, of course, voluntarily agree to such an arrangement". ROA.8737. App. 12a.

Li tried and was unable to raise fund from shareholders of the AHEC to continue employment of Walker & Patterson. Therefore, Li requested permission from the chairperson of the AHEC, Mr. Niko Celentano, to prosecute the appeal individually. ROA.10421. In Walker & Patterson's Response to the District Court's inquiry, the counsel stated that "the AHEC did not intend to prosecute the appeal, but dismissal was not sought because of the filings by other interested parties in this matter". ROA.10042.

J. C. Penney falsely stated that the AHEC had only four members. In reality, the "four members" were the earliest members and leaders of the AHEC. The Debtor also falsely stated that Li did not object the sale in the Bankruptcy Court.

As a matter of a fact, Li filed several objections as a shareholder and member of the AHEC in support of the AHEC's actions. ROA.316, 532, 546.

On December 28, 2020, Li filed an emergency motion at the District Court and requested to be listed as an interested person when the AHEC was unable to retain counsels to continue the appeal. ROA.9488. Li noted the District Court with the AHEC's permission for Li to prosecute the appeal with email and response from the AHEC's counsels. ROA.10412, 10421. The motion was not ruled. If the motion was ruled, Li and the AHEC would have an opportunity to correct any possible deficiency and file a motion for reconsideration to substitute[13].

In the Order entered by the District Court on January 13, 2021, the Court ordered:

> "the Clerk of Court to substitute Mr. Niko Celentano as the contact person for AHEC. In the event that AHEC seeks to participate further in this action without licensed legal representation, the Court ORDERS that any paper filed on behalf of AHEC demonstrate that right. This Order terminates all pending motions and this action is terminated." ROA.10425-10432. App. 2a-9a.

The Order of the District Court set an unfair precedent by granting a chairperson of an ad hoc equity committee with sole privilege and obligation to prosecute a legal action in the event the committee could not do so collectively. In common sense, an ad hoc committee is a loose affiliation of similarly situated stakeholders that jointly retain counsel to take collective action. The privilege and

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[13] If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. Fed. R. Civ. P. 25 (b). If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. Fed. R. Civ. P. 25 (c).

obligation granted by the District Court to Mr. Niko Celentano was not defined when the AHEC was formed in the J. C. Penney Bankruptcy Case.

J. C. Penney argued that Li did not file the Notice of Appeal at the Bankruptcy Court which was filed by the AHEC. But Li can substitute the AHEC and transfer the interests from the AHEC, pursuant to Fed. R. Civ. P. 25(b) and (c). The District Court did allow substitution in the event that the AHEC could not continue the appeal collectively. But the District Court erred by providing the appellate right to Mr. Celentano who was incompetent to prosecute the appeal without legal representation, and gave permission to Li. Li should be permitted to substitute the AHEC and continue the appeal filed by the AHEC.

B. The Appeal Should Not Be Dismissed for Statutory Mootness

In the discussion of statutory mootness, J. C. Penney argued and the District Court held that "Li Li has not countered this issue by demonstrating that a good faith issue was raised in the Bankruptcy Court proceeding". ROA.10427. As demonstrated, the AHEC argued that "the requirements of 363(m) have not been satisfied" in the Bankruptcy Court. ROA.6922. In Li's Response to oppose J. C. Penney's motion to dismiss, Li cited exactly the same argument raised by the AHEC in the Bankruptcy Court. Li stated that "The AHEC raised the issue of good faith at the Bankruptcy Court to preserve the argument to appeal regarding the statutory mootness". ROA.9263.

J. C. Penney failed to meet the evidentiary burden to substantiate the "good faith" requirement satisfied in the OpCo transactions. They similarly failed to

demonstrate the OpCo purchase price was fair and reasonable. They merely argued "good-faith" was raised the first time in appeal which is demonstrably false.

C. The Appeal Should Not Be Dismissed for Standing

In the discussion of standing, J. C. Penney argued and the District Court held that "Li Li has failed to provide any evidence on which this Court may find the Debtor's assets to exceed its liabilities. Therefore, Li Li has not demonstrated standing." ROA.10430. J. C. Penney and the District Court should find that Li cited the assessment of the Debtor's assets from Mr. William Snyder and included his Declaration as an exhibit in the Response to oppose the Debtor's motion to dismiss. ROA.9246. Mr. Snyder stated "Residual cash, asset values and preservation of the going concern result in maintaining a company with equity value, which provides for a recovery for unsecured creditors, and potentially shareholders." ROA.9384. The evidence does not support J. C. Penney's argument and the District Court's holding that "Debtor's assets were insufficient to allow any recovery for equity interest holders under any available scenario". ROA.10427. Mr. Snyder stated that "I declare under penalty of perjury that the foregoing is true and correct." ROA.9388.

J. C. Penney failed to provide a liquidation analysis. The Debtor's subjective belief does not meet evidentiary standards. The Debtor similarly failed to provide the fact that the Debtor and the DIP Lenders reached settlement with the Debtor's

First Lien Minority Creditors[14] and the Unsecured Creditors Committee. ROA. 489, 499. Shareholders are fully impaired.

In re Paragon Offshore PLC, 597 B.R. 748, 758 (D. Del. 2019). Another district court suggested that a shareholder might have standing if it can show that there was sufficient equity in the debtor's estate to make a difference to the value of its shares. *Id.* While the Bankruptcy Code provides a multitude of tools to effectuate sale transactions and reorganizations, it should not be used as a sword and a shield against all stakeholders. The Debtor hired powerful lawyers, paying in excess of $1,300 per hour to their counsels[15]. The Debtor's counsels created barriers after barriers to block shareholders' prosecution who are aggrieved, and whose pecuniary interests are directly affected by the Debtor's OpCo Sale. The J. C. Penney Bankruptcy Case is egregious.

D. The Relief Requested Would Not Unwind the Consummated Sale.

Although J. C. Penney's retail business was transferred to the Purchasers, Simon and Brookfield, it is not a scrambled egg. The retail business is, as a matter of fact, just operating under new ownership, it is the same unscrambled egg by its nature.

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[14] First Lien Minority Creditors strongly objected the sale of the Debtors' PropCo to the DIP Lenders, "Greed is the inventor of injustice. ... DIP Lender Group have crossed the line and appear intent on stealing as much value as possible from other creditors. That the Debtors seem intent on helping them achieve this goal is just as troubling. ... A proper liquidation analysis will show, however, that the Credit Bid unfairly prejudices First Lien Creditors and provides a windfall to the DIP Lenders contrary to the Bankruptcy Code." [Bankruptcy Court Docket 1621].

[15] The professional fees paid to the Debtors' counsels (Kirkland & Ellis LLP) were over $17 million. [Bankruptcy Court Docket 2368].

A critical inquiry for appellants and appellate courts is whether it is possible to fashion limited remedies that would not cause an unwinding of the reorganization plan. Courts may seek to balance the finality of plan confirmation against the plan objector's appellate rights by striking or rewriting — sometimes referred to as "blue penciling" — certain aspects of the confirmed bankruptcy plan on appeal. Thus, rather than dismissing appeals as equitably moot, courts have allowed parties to seek disgorgement of plan distributions or professional fees, or strike indemnification provisions or plan releases. *Id. See In re Tribune Media Co.*, No. 14-3332 (3d Cir. 2015).

Remedies in the J. C. Penney's Bankruptcy Case are available without unwinding the consummated OpCo transactions, especially with the condition that the Debtor' Reorganization Plan has not been confirmed yet at the Bankruptcy Court.

CONCLUSION

The issues in this case involve serious legal questions on approval of a *sub rosa* plan that has far-reaching effects of public concern regarding the strict mechanics of the statutory scheme imposed by the Bankruptcy Code. The opinion of this Court shall have profound implications on future Bankruptcy Cases.

The evidence does not support a good faith in connection with J. C. Penney's OpCo Sale. The assets were sold with arbitrarily depressed price to create the greatest windfalls for the Purchasers and no recovery for shareholders. The Bankruptcy Court erred in approving the sale of J. C. Penney's crown jewel retail

assets pursuant to 11 U.S.C. § 363 under an impermissible *sub rosa* plan. The District Court and the Court of Appeals erred in dismissing the appeal.

This Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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